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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-6

HILMAR G. MOORE, et al.,
Appellants,

vs.

JOHN PLEASANT SIMS, et al.,
Appellees.

On Appeal from the United States District Court for the Southern District of Texas, Houston Division

BRIEF AMICUS CURIAE FOR WANDA DIXIE, HER MINOR CHILDREN, AND THE NATIONAL CENTER FOR YOUTH LAW

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BRIEF AMICUS CURIAE FOR WANDA DIXIE, HER MINOR CHILDREN, AND THE NATIONAL CENTER FOR YOUTH LAW

INTERESTS OF AMICI CURIAE[1]

Amicus Curiae Wanda Dixie is the mother of five minor children, Shelly, Leslie, Diana, Billie and Tammy. The Dixie family are plaintiffs in *Dixie v. Meier,* (W.D. Tex. Austin Div. Civil No. A-77-CA 229, filed Dec. 8, 1977), a suit for declaratory relief and damages pending in the Western District of Texas.

[1] Written consent for the filing of this Brief *Amicus Curiae* in the form of letters from counsel both for Appellants and for Appellees, pursuant to Supreme Court Rule 42(2), have been filed with the Clerk of the Court.

Defendants in *Dixie v. Meier* are agents of appellant Texas Department of Human Resources who allegedly seized and removed the children from their mother's home without notice and an opportunity to be heard. It is alleged in *Dixie* that the children were held in custody for more than seven months before the Department obtained an emergency *ex parte* order to retain custody of the children, and that no hearing was held during that time period at which Wanda Dixie could contest the removal of her children.

The plaintiffs in *Dixie* have a direct interest in the outcome of this litigation. As in the case *sub judice*, their claim is based on the contention that due process of law as guaranteed by the fourteenth amendment to the United States Constitution requires a prompt post-removal hearing to determine the propriety of the children's seizure.

The National Center for Youth Law, formerly the National Juvenile Law Center of St. Louis, Missouri, and the Youth Law Center of San Francisco, California, is a national legal services support center funded by the federal Legal Services Corporation for the express purpose of protecting the rights of indigent parents and their children. Center attorneys have appeared as counsel before this Court in cases dealing with juvenile court proceedings [*Breed v. Jones*, 421 U.S. 519 (1975); *The Oklahoma Publishing Co. v. The District Court of Oklahoma County*, 430 U.S. 308 (1977)] and with public education [*Lau v. Nichols*, 414 U.S. 563 (1974)]. Moreover, Center attorneys have studied numerous model abuse and neglect statutes and are familiar with the statutory provisions of many jurisdictions. The Center also appeared as *amicus curiae* in the District Court in the present action. (Brief filed August 1976.) The Center believes that its continued participation in this litigation will assist the Court in deciding the important issues raised by this appeal.

SUMMARY OF ARGUMENT

This Court has "frequently emphasized the importance of the family" in American life. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). Parents have transcending interests in the custody of their children, and children have a reciprocal interest in maintaining the integrity of the family unit. Thus, when the state intrudes in that relationship "this Court must examine carefully the importance of the governmental interests advanced." *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 499 (1977).

After an allegedly abused or neglected child is seized by the state, Texas law requires that a hearing be commenced to determine whether the child should remain in custody or returned home pending a full adversary hearing. TEX. FAM. CODE ANN. §17.02. The court below held that "barring unusual circumstances" this hearing should take place not "beyond the very day of seizure." *Sims v. State Dept. of Public Welfare, Etc.*, 483 F.Supp. 1179, 1193 (S.D. Tex. 1977). *Amici* submits that only by holding such a prompt post-removal hearing can due process be satisfied.

"The very fact of removal from even an inadequate natural family is often traumatic for the child." *Smith v. O.F.F.E.R.*, 431 U.S. 816, 837, n. 40 (1977). Child development experts frequently disagree as to whether a child's interests are served best by removal, and the data indicates that many children are improperly removed from their homes. Thus, it is imperative that a prompt hearing be held "to minimize substantively unfair or mistaken" seizures of children from their parents. *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972).

At the post-removal hearing due process mandates that an attorney be appointed to advocate the interests of the child.

Conflicts between parent and child, as well as conflicts between state and child, can only be minimized by separate representation for the child.

Further, the standard of proof in all court proceedings which might result in removal of a child should be "clear and convincing evidence." A "preponderance of the evidence" standard does not provide a test rigid enough to prevent unnecessary disruptions of the family.

Finally, the court below did not err in its refusal to apply the doctrine of *Younger v. Harris*, 401 U.S. 37 (1971), to the case *sub judice*. In *Gerstein v. Pugh*, 420 U.S. 103, 108, n.9 (1975), the Court held that absention was improper in a case virtually identical to the instant case. In both cases, the injunctions were not directed at the state prosecution as such, but rather challenged only the legality of pre-adjudication detention, an issue that could not be raised in defense of the prosecution. The injunction here, as in *Gerstein*, in no way could prejudice the trial on the merits. Therefore, it was proper for the lower court to provide a forum in which the parties could present their constitutional claims.

ARGUMENT

I

The Due Process Clause of the Fourteenth Amendment to the United States Constitution Requires That a Hearing Be Held Immediately After the State Intrudes on the Privacy of the Family Unit.

A. Introduction

It is necessary to clarify at the outset the limited scope of the issues regarding hearing rights presented to this Court. The three-judge court held that a full adversary hearing must be commenced within ten days of the seizure of the child, 438 F. Supp. at 1193, and that counsel must be appointed to represent the child at that adversary hearing. 438 F.Supp. at 1194. None of the parties in this action challenge these holdings. Jurisdictional Statement at 37, 39 (hereinafter "J.S."); Appellant's Brief at 40-42 (hereinafter "A.B.").

The "hearing" at issue in this appeal is the initial post-removal hearing required by TEX. FAM. CODE ANN. §17.02 which may be held *ex parte*. The Texas Family Code permits law-enforcement or juvenile probation officers to take possession "of a child to protect him from an immediate danger to his health or physical safety." TEX. FAM. CODE ANN. § 17.01.[2] The officer must then "file a petition in the court immediately on delivery of the child to the court, and a hearing be held to provide for the temporary care or protection of the child." TEX. FAM. CODE ANN. § 17.02. This hearing "may be held without notice." TEX. FAM. CODE ANN. § 17.03.

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[2] The three-judge panel upheld this language as representing "a constitutionally adequate standard." 438 F.Supp. at 1192.

With respect to these sections, the three-judge panel first held that "the due process interest of the parent is such as to require the State to make all reasonable efforts to serve upon them notice of this initial presentation to the court." 438 F.Supp. at 1192-93. "Appellants do not contest this . . . requirement," nor do they challenge the statutory requirement that such a "hearing" be held at some time *prior* to the full adversary hearing. A.B. at 40-41. Rather, they contest only the court's holding that:

> Barring unusual circumstances, the State's interest in the protection of the alleged victims of abuse and the resulting usurpation of parental rights does not justify holding this *ex parte* presentation to a judicial authority beyond the very day of seizure.

438 F.Supp. at 1193; A.B. at 41.[3]

Appellants urge that "the governmental agency charged with protecting the children of Texas be allowed a reasonable time (*i.e.*, not the 'very day') to seek judicial approval for the assumption of emergency custody." A.B. at 41. *Amici* do not argue against a "reasonable time rule," nor do we argue against the seizure of children in genuine emergency situations. Rather, we too urge that the *"ex parte"* hearing be held within a "reasonable" time after a seizure. What constitutes a "reasonable time" shall be the focus of this section.

B. Significant Liberty Interests Are at Stake in This Case

The "root requirement" of the due process clause is that an individual be given an opportunity for a hearing *before* he

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[3] The three-judge panel found an additional "constitutional defect" in §17.02:

> Through what this court assumes to be legislative oversight, the hearing is "to provide for the temporary care or protection of the child"—language which assumes that such care or protection is needed. 438 F.Supp. at 1193.

Appellants do not question this holding. *See* J.S. at 4-6.

is deprived of any significant property or liberty interests "except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971). Neither appellees nor *amici* suggests that a prior hearing is required in the case *sub judice*. They do submit, however, that even should the summary seizure have been justifiable, the hearing must follow the seizure as soon as "practicable". *See, e.g., Goss v. Lopez*, 419 U.S. 565, 582-83 (1975). For purposes of this appeal, the parents and children urge that the due process clause of the fourtenth amendment requires that an *"ex parte"* hearing be held within twenty-four hours of the seizure to determine whether seized children should remain in custody pending the full adversary hearing or whether the family can be reunited immediately without danger to the children. Motion to Affirm at 35.

In reviewing the requirement that the state must hold an *"ex parte"* hearing within twenty-four hours, or within a reasonable time after the summary seizure, the initial inquiry is whether appellees have been deprived of their constitutional rights by the state's failure to hold such a hearing in this case.

This Court has established a framework for analysis of such due process claims. Initially it must be determined whether appellees have been deprived of "interests encompassed by the fourteenth amendment's protection of liberty and property." *Board of Regents v. Roth*, 408 U.S. 564, 569 (1972). Should such deprivation be found, the Court must next determine "the nature of the process that is due." *Morrissey v. Brewer*, 408 U.S. 471, 484 (1972).

The fundamental interest in familial privacy and integrity, which encompasses the rights of parents to retain custody of their children and of children to the care and protection of their parents, is indisputably one of paramount importance.

This case concerns:

> [T]he most essential and basic aspect of familial privacy —the right of the family to remain together without the coercive interference of the awesome power of the state. This right to the preservation of family integrity encompasses the reciprocal rights of both parent and child.

Duchesne v. Sugarman, 566 F.2d 817, 825 (2d Cir. 1977).

It is a truism that: "This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the fourteenth amendment." *Cleveland Bd. of Ed. v. LaFleur*, 414 U.S. 632, 639-640 (1974); *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 499 (1977).[4]

The parent has a transcending interest in the "companionship, care, custody and management of his or her children." *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). Similarly, the children's paramount interests are to maintain the "emotional attachments that derive from the intimacy of daily association" with the parent. *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 844 (1977).

This Court has on numerous occasions given support to the reciprocal rights of parents and their children:

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[4] "[A host of cases, tracing their lineage to *Meyer v. Nebraska*, 262 U.S. 390, 399-401 (1923); and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); have consistently acknowledged a 'private realm of family life which the state cannot enter.' *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). *See, e.g., Roe v. Wade*, 410 U.S. 113, 152-153 (1973); *Wisconsin v. Yoder*, 406 U.S. 205, 231-233 (1972); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Ginsberg v. New York*, 390 U.S. 629, 639 (1968); *Griswold v. Connecticut*, 381 U.S. 479, *id.*, at 495-496 (Goldberg, J., concurring); *id.*, at 502-503 (White, J., concurring); *Poe v. Ullman*, 367 U.S. 497 (1961) (Harlan, J., dissenting); *cf. Loving v. Virginia*, 388 U.S. 1, 12 (1967); *May v. Anderson*, 345 U.S. 528, 533 (1953); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)]"

Moore v. City of East Cleveland, Ohio, 431 U.S. 494, 500 (1977).

> The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed 'essential', *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); 'basic civil rights of man,' *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); and '[r]ights far more precious than property rights,' *May v. Anderson*, 345 U.S. 528, 533 (1953). 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.' *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

Stanley v. Illinois, 405 U.S. at 651.

Although the family is not beyond regulation:

> [W]hen the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation. *See Poe v. Ullman, supra*, 367 U.S. at 554 (Harlan, J., dissenting).

Moore v. City of East Cleveland, Ohio, 431 U.S. 494, 499 (1977).

Because the summary removal of a child from its parents destroys familial integrity, it is essential that the Court carefully examine the propriety of this disruption as soon after its occurrence as is practicable.

C. Due Process Mandates That a Hearing Be Held Immediately After Children Are Removed From Their Family

The determination that liberty interests are implicated by the summary removal of children from their parents is but the threshold inquiry. We must next determine what process is due.

There is no litmus test by which one can automatically determine the requisites of due process. "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). This Court has accordingly mandated the following form of analysis:

> [O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *See, e.g., Goldberg v. Kelley*, 397 U.S. at 263-71.
>
> *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976).

1. **Private Interest**

The interests in preserving family integrity have been discussed above. This Court has stated that "the very fact of removal from even an inadequate natural family is often traumatic for the child." *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816, 837, n. 40, citing Wald, *State Intervention on Behalf of "Neglected Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights,"* 28 STAN. L. REV. 625 (1976). Other experts are in agreement:

> The drastic nature of summary seizure can be seen in the testimony of the experts. Drs. Provence and Solnit state that 'summary removal of a young child from a parent who has been his major caregiver is a severe threat to his development [because] it disrupts and grossly endangers what he most needs, that is, the continuity of affectionate care from those to whom he is attached through bonds of love.' These two doctors believe that summary seizure should be resorted to only when the child's 'physical survival' is at stake. Dr. Robitscher states that summary seizure is justified in his opinion only when the child's physical health and emotional health are at serious risk after all other alternatives to removal have been thoroughly studied.

Roe v. Conn, 417 F.Supp. 769, 778, n. 9 (M.D. Ala. 1976) (three-judge court).[5]

Indeed, even the shortest separation of child from parent constitutes a terrible deprivation, particularly to the infant child:

> Unlike adults, who have learned to anticipate the future and thus to manage delay, children have a built-in time

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[5] "Dr. Sally A. Provence is professor of pediatrics at Yale University Child Study Center and Director of the Child Development Unit, author of Guide to the Care of Infants in Groups (1967), and co-author of Infants in Institutions. . . . Dr. Albert J. Solnit is Sterling Professor of Pediatrics and Psychiatry and Director of the Child Study Center at Yale University. . . . Dr. Jonas Robitscher is a Henry R. Luce Professor of Law and the Behavorial Science at Emory University Schools of Law and Medicine."

Roe v. Conn, 417 F.Supp. at 776, nn. 5, 6, and 7.

See also, Goldstein, Freud and Solnit, *Beyond the Best Interests of the Child*, (MacMillan, 1973); Mnookin, "Foster Care—In Whose Best Interest?", 43 HARV.ED.REV. (1973); Seen and Solnit, *Problems in Child Behavior*, (Lea & Febiger, 1968); Freud, *Normality and Pathology in Childhood*, (International Universities Press, 1965); Winnicott, *Mother and Child*, (Basic Books, 1957); Littner, *Some Traumatic Effects of Separation and Placement*, (Child Welfare League of America, 1956); Glickman, "Treatment of the Child and Family After Placement", 28 SOCIAL SERVICE REV. 279 (September 1954); Bowlby, *Maternal Care and Mental Health*, Monograph No. 2 (World Health Organization, 1952); Young, "Placement from the Child's View", 31 SOCIAL CASEWORK 250 (1950); Goldfarb, "Effects of Psychological Deprivation in Infancy and Subsequent Stimulation", 102 AM. J. PSYCH. 18-33 (1945); Ribble, *The Rights of Infants* (Columbia Univ. Press, 1943).

sense based on the urgency of their instinctual and emotional needs. . . .

Emotionally and intellectually an infant and toddler cannot stretch his waiting more than a few days without feeling overwhelmed by the absence of parents. He cannot take care of himself physically, and his emotional and intellectual memory is not sufficiently matured to enable him to use thinking to hold on to the parent he has lost. During such an absence for the child under two years of age, the new adult who cares for the child's physical needs is latched onto 'quickly' as the potential psychological parent. The replacement, however ideal, may not be able to heal completely, without emotional scarring, the injury sustained by the loss.

Goldstein, Freud and Solnit, at 40-41.[6]

Similarly, the removal of one's children causes the parent(s) severe grief:

> Obviously, when a parent is deprived of custody, he is likely to suffer intense sorrow and pain. [L]abeling the parent as neglectful and imposing outside supervision and control

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[6] *See also,* Goldstein, *Medical Care for the Child at Risk: On State Supervention of Parental Autonomy,* 86 YALE L. J. 645, 649-50 (1977) (footnotes omitted), cited in *Duchesne v. Sugarman,* 566 F.2d at 825, n.19:

> No other animal is for so long a time after birth in so helpless a state that its survival depends upon continuous nurture by an adult. Although breaking or weakening the ties to the responsible and responsive adults may have different consequences for children of different ages, there is little doubt that such breaches in the familial bond will be detrimental to a child's well-being. But 'so long as a family is intact, the young child feels parental authority is lodged in a unified body which is a safe and reliable guide for later identification.' Court or agency intervention without regard to or over the objection of parents can only serve to undermine the familial bond which is vital to a child's sense of becoming and being an adult in his own right.

> over parental decisionmaking will often result in feelings of shame and fear on the part of the parents.

Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards,* 27 STAN.L.REV. 985, 996 (1975).

2. **Risk of Error.**

Given the trauma associated with summary removals, procedural safeguards are essential to insure the least risk of erroneous deprivation of parental care consistent with the safety of the child.[7] Because the risk of trauma to the separated child increases with the duration of separation, the procedural safeguards advocated by *amici,* judicial determination of the propriety of the seizure within the next business day after the act and the right to counsel at that determination, (see Sec. II, *infra*), have a greater probable value of eliminating the harmful effects of an erroneous deprivation than a rule which allows several days to elapse prior to a judicial hearing.

Furthermore, once a child is taken away from its natural parent, it becomes increasingly difficult for the parent to regain custody. At the full adversarial hearing, the court will be aware of prior administrative and judicial actions and these cannot help but to color its final determination. Separation of the child will make the parent's and/or child's attorney's job more difficult. Visiting with the child may be a problem, particularly in geographically large areas. Evidence gathering and testing the child, all become more difficult when the child is

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[7] Most commentators have suggested that summary removals are overused. *See, e.g.,* Burt & Balyeat, *A New System for Improving the Care of Neglected and Abused Children,* 53 CHILD WELFARE 167, 168 (1974); Campbell, *The Neglected Child: His and His Family's Treatment Under Massachusetts Law and Practice and Their Rights Under the Due Process Clause,* 4 SUFF. L. REV. 631, 648-49 (1970); Levine, *Caveat Parens: A Demystification of the Child Protection System,* 35 U.PITT.L.REV. 1, 29-30 (1973).

away from home. Thus, the decision as to whether a child is returned to the parents at the initial post-removal hearing may well decide the final outcome of the case. The risk of an erroneous deprivation is not one of a mere ten days duration, *i.e.*, until the full adversary hearing, but rather, one which may have a lasting impact on the integrity of the family. In these circumstances, it is imperative that judicial review be undertaken as soon after the deprivation as is practicable.

Further, the decision to remove a child from its parents versus the decision to leave a child with its parents is a most subjective one. Indeed, the State characterizes it as "not readily quantifiable." A.B. at 44. Placement decisions are inexact determinations and the margin of error is quite high. For example, in one controlled study three professional child welfare specialists reviewed the placement decisions in 50 cases, involving 94 children, whose families were believed to be in need of some form of family services. The experts made individual determinations which children should have been removed from their parents and which should be given supportive services in their own homes. The three experts reached agreement in *less than half the cases.*[8] Phillips, *et al., Factors Associated With Placement Decisions in Child Welfare*, (Child Welfare League of America, 1971).

Courts similarly have difficulty in making placement decisions:

> Most judges rely heavily on social work personnel in making decisions. Unfortunately, while some courts are blessed with a group of highly trained, dedicated workers, most staffs are filled with young, inexperienced workers who have received little in the way of college or in-service

[8] This disparity occurred despite the fact that their decisions were based upon over 150 separate items of information relating to the need for assistance, including economic and social conditions of the family, behavorial characteristics of all family members and the adequacy of existent parental care.

> training to prepare them to make such decisions. Staff turnover is very high. Caseloads are so high that individual attention cannot be given every case. Thus, in our current system those making the decisions often do not have the background, time or resources necessary to make good clinical predictions.

Wald, (1976) at 640.[9]

Thus, the propensity for error, for children to be improperly removed, is great in this context. Unlike the decisions to be made in *Mathews v. Eldridge*, 424 U.S. at 343, those here are neither "sharply focused" nor "easily documented." Instead the propensity for error is quite high. The few studies of the subject reflect this. For example, in Davidson County (Nashville), Tennessee, 632 children were named in neglect and dependency petitions in 1969. M. Burt & L. Blair, *Options for Improving The Care of Neglected and Dependent Children* 35 (1971):

> Fifty percent (317 out of 632) of all petitioned children were returned home or to relatives without any further supervision by the court or the welfare department. An additional 23 percent (66 intensive supervision cases and 79 continued cases) were returned home under the supervision of the Department of Public Welfare. The remaining 27 percent of the children were placed in Department of Public Welfare foster homes, voluntary organizations (generally institutional settings), or Richland Village (state institution) (usually pending placement at a foster home or voluntary institution).

[9] This Court has recognized that:

> Studies also suggest that social workers of middle-class backgrounds, perhaps unconsciously, incline to favor continued placement in foster care with a generally higher-status family rather than return the child to his natural family, thus reflecting a bias that treats the natural parents' poverty and lifestyle as prejudicial to the best interests of the child.
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> *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816, 834.

Similarly, in San Diego, California, "50% of the 2,140 children removed from their homes [between October 1976 and March 1977 were] placed in Hillcrest [dependent shelter] and they returned home again in less than 5 days." B. Barrett, *Child Abuse Public Hearings* 3 (1978). A prompt hearing is required to insure that improperly removed children are returned home, and to insure that the period of separation is kept to the minimum.

3. Government's Interest

In discussing the government's interest, we must again point out the limited scope of the question presented. See pp. 5-6, *supra*. A removal hearing is required by statute. TEX. FAM. CODE ANN. § 17.02. The only question is its timing. Thus, the fiscal considerations of *Mathews v. Eldridge*, 424 U.S. at 347, in which it was determined that increased process would result in "an increased number of hearings," do not come into play. Indeed, should the parents prevail the state will save money, because the prompt return of children to their parents will save the state the cost of subsidizing shelter, institutional, or emergency foster care for those children unnecessarily seized from their parents.[10]

The State urges that to hold prompt hearings would result in the "return [of] such children to conditions threatening their health and physical safety." A.B. at 41. However, they fail to explain why this is so. They seem to be assuming that all removals are warranted and/or that prompt "*ex parte*" hearings have a greater likelihood of returning children to their homes.

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[10] Such care can be extremely costly. For example, in 1971, the Nation spent $117,144,000 on juvenile "temporary care facilities" (detention centers, shelters, reception or diagnostic centers) with per capita operating expenditures of $7,688 per child. LEAA CHILDREN IN CUSTODY: A REPORT ON THE JUVENILE DETENTION AND CORRECTIONAL FACILITY CENSUS OF 1971, Table 16 at p.19.

How delaying the hearings will result in more accurate determinations mystifies *amici*. Hearings must be held. The question is how long the state can delay before holding them. If it is determined at the hearing that the return of the children to their homes would threaten their physical safety, the court will not return them to their homes, but will simply uphold the propriety of the summary removal pending the full adversarial hearing.

4. Balancing the Interests

To recapitulate, we have shown that summary removals result in enormous harm to family integrity, that the risk of state error is great in this context and that the governmental interests in further delay are very questionable. The question of when it is "practicable," *Goss v. Lopez*, 419 U.S. at 582-83, to hold post-removal hearings shall now be considered.

The court below suggests that, "barring unusual circumstances," the *ex parte* hearing should be held on the day of the seizure. 438 F.Supp. at 1193. Appellees suggest that a twenty-four hour standard was required by the three-judge panel and is constitutionally mandated. Motion to Affirm at 35. Some commentators agree with a twenty-four hour standard. *See, e.g.*, Wald, (1976) at 630, n. 26.[11]

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[11] *See also*, National Advisory Committee on Criminal Justice Standards and Goals, *Juvenile Justice and Delinquency Prevention*, 396, Standard 12.9 (1976):

> Within 24 hours of the time the child is removed, the agency responsible for filing petitions should either file a petition alleging that the child is endangered or return the child to the home. If a petition is filed, the court should immediately convene a hearing to determine if emergency temporary custody is necessary to protect the child from bodily injury.

And, *Report of The Advisory Committee to the Administrator on Standards for the Administration of Juvenile Justice*, 97, Standard 3.157 (U.S. Dept. of Justice, Law Enforcement Assistance Administration (1976): "Unless the juvenile is returned home earlier, a hearing should be held before a family court judge no more than 24 hours after the juvenile has been taken into custody."

An alternative is proposed by the Institute of Judicial Administration—American Bar Association: Juvenile Justice Standards Project. *See* IJA-ABA: Juvenile Justice Standards Project, *Standards Relating to Abuse and Neglect* (Tentative Draft) (Ballinger Publishing Co., 1977). Those "Standards" recommend that "no later than the first business day after taking custody of a child . . . the agency should be required to report such action to the court. . . ." Standard 4.2B. "Immediately upon receipt of a petition . . ., the court should direct notification . . ., appointment of counsel for the child . . ., and referral of the petition for prosecution. . . . On the same business day if at all practicable, and no later than the next business day, the court should convene a hearing to determine whether emergency temporary custody of the child should be continued, . . ." Standard 4.3A.

The Commentary to the *Standards* notes that:

> The guiding principle here is the recognition of the importance of certainty and permanence to the child's psychological well-being. If there is no compelling reason to displace the presumption of parental autonomy, return to the custody of parents or other such caretakers should take place immediately. . . .
>
> The child's capacity to cope with loss and uncertainty is limited by what, in adult terms, seems a distorted sense of time. Delay in achieving a permanent status and resultant uncertainty and distress, therefore, may be of a longer duration in the child's world than in adult perception. *See* J. Goldstein, A. Freud, and A. Solnit, *Beyond the Best Interests of the Child*, 40-45 (1973). The prolonging of temporary custody performs a disservice to the child in that it disrupts and precludes the formation of meaningful, permanent, and stable emotional bonds.

Commentary to Standard 4.3A p. 87.

Thus, the adoption of such a standard would not only protect the integrity of the family by returning children who were erroneously removed from their families pending the full adversarial hearing, but would also lessen the potential for trauma to the erroneously removed child. By treading a middle ground between an inflexible twenty-four hour rule and an overly vague "not the 'very day' " rule (A.B. at 41), *amici* suggest that these Standards most closely approximate what constitutes a "reasonable time" in light of the policies to be effectuated.

II

Independent Counsel Should Be Appointed for Children at the Post-Removal Hearing.

A growing number of courts have recognized that *parents* facing loss of custody of their children or termination of their parental rights are entitled to protection of the due process clause by appointment of independent counsel.[12] These decisions have stressed the significant nature of the parent-child relationship, the gross imbalance of resources between the parent and the state, and the incompetence of laymen-parents to adequately represent themselves at a complex legal proceeding.

The rationale of these decisions, confirming that parents have a due process right to appointment of counsel in proceedings

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[12] *See, e.g., Davis v. Page*, 442 F.Supp. 258 (S.D. Fla. 1977); *Smith v. Edmiston*, 431 F.Supp. 941 (W.D. Tenn. 1977); *Reist v. Bay County Circuit Judge*, 241 N.W.2d 55 (Mich. 1976); *Lemaster v. Oakley*, 203 S.E.2d 140 (W.Va. 1974); *In re Welfare Luscier*, 524 P.2d 906 (Wash. 1974); *In re Adoption of R.I.*, 312 A.2d 601 (Pa. 1973); *Danforth v. State Department of Health & Welfare*, 303 A.2d 794 (Me. 1973); *In the Interest of Friesz*, 208 N.W. 2d 259 (Neb. 1973); *In re Rodriquez*, 110 Cal. Rptr. 56 (Cal. App. 1973); *In re B.*, 285 N.E.2d 288 (N.Y. 1972); *Shappy v. Knight*, 475 S.W.2d 704 (Ark. 1972); *State v. Jamison*, 444 P.2d 15 (Ore. 1968); and *Chambers v. District Court of Dubuque County*, 152 N.W.2d 818 (Iowa 1967).

to limit their parental rights, is equally applicable in assessing the child's due process right to counsel. The child's liberty interest in the parent-child relationship is co-extensive with that of the parent. Moreover, a child is even less competent than the layman-parent to represent his/her interests in a complex legal hearing, creating an even greater imbalance of resources between the child and the government, than between the parent and the government.[13]

The court below held that an attorney must be appointed to represent the interests of a child who is the subject of a suit affecting the parent-child relationship. *Sims*, 438 F.Supp. at 1194. "Appellants contest this ruling only insofar as the Court included in its decision a requirement for representation at the *ex parte* hearing. . . ." A.B. at 42. Appellants argue that the appointment of counsel for the initial emergency hearing "is not necessary to meet the fundamental fairness standard for due process in juvenile proceedings" because the " 'very day' hearing . . . can never settle any right of any party." A.B. at 42-43. They argue that because the purpose of the hearing is merely to determine whether an emergency situation exists:

> the fundamental fairness requirement will be met by appointment of a legal representative for the child for the full adversary hearing which will be held no longer than 10 days from the actual seizure of the child.

A.B. at 43.

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[13] *See generally*, Note, *Child Neglect: Due Process For The Parent*, 70 COLUM. L. REV. 465 (1970); Catz & Kuelbs, *The Requirement of Appointment of Counsel for Indigent Parents in Neglect or Termination Proceedings Developing Area*, 13 J. OF FAM. LAW 223 (1973);

Comment, *"Dependent-Neglect Proceedings: A Case for Procedural Due Process,"* 90 DUQ. L. REV. 651 (1971); Comment, "The Indigent Parent's Right to Appointed Counsel in Actions to Terminate Parental Rights," 43 U. CIN. L. REV. 635 (1974); Garff, "Handbook for New Juvenile Court Judges," NAT'L. COUNCIL FOR JUV. COURT JUDGES 42.

Yet the court below found to the contrary and extended the requirement of appointment of counsel for the child to the "emergency" proceeding because the *result* of this proceeding "may be the institution of a suit for the termination of the parent-child relationship." 438 F.Supp. at 1195. Thus the emergency hearing is the first step in a process which may settle the rights of the parties and which may in fact determine the future of the child's special relationship with its parents.

The court below emphasized "the separate competing interests necessarily involved in any suit affecting the parent-child relationship" and noted that:

> The interest of the state and the interest of the child differ in such a manner that *they must be assumed to be adverse until there has been a final adjudication on the merits.*

Sims, 438 F.Supp. at 1194 (emphasis added).

It is clear then that although the state has a legitimate interest in intervening in the relationship between the parent and child (*i.e.*, to protect the child), the interest of the state and the child do not coincide to such an extent that the state can speak for the child at this important stage in the proceedings.

This position was stressed in *Stapleton v. Dauphin County Child Care Service*, 324 A. 2d 562, 573 (Pa. Super. Ct. 1974), in which the court rejected the idea that the child care agency was "the repository of the child's best interests" and therefore could waive the child's statutory right to counsel. The court stated:

> The purpose of the hearing will be to determine what is in [the child's] best interests. To confer power to waive counsel whether on the [biological parents, the foster parents], or the child care service, would be to pre-judge the case, since it would amount to a determination that

> the party's interests were in accord with [the child's] best interest.

The court in *Stapleton* also indicated that neither the biological parent nor the state was qualified to determine the child's best interest. In fact only after a full hearing in which the child has independent counsel, may the best interests of the child be determined.

Although there are strong ties between the parent and child, it cannot always be assumed that the parent and child have completely compatible interests. In a number of situations, the conflict of interests between parents and their children have been noted.

The treatment of children as mere appendages of their parents by the government has been consistently rejected by this Court. For example, in *In re Gault*, 387 U.S. 1, 16 (1967), this Court condemned the reliance on the *parens patriae* doctrine to "rationalize the exclusion of juveniles from the constitutional scheme." This Court has recently reiterated its recognition of the constitutional rights of children:

> Constitutional rights do not mature and come into being magically when one attains the state defined age of majority. Minors, as well as adults, are protected by the constitution and possess constitutional rights.

Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976). This Court went on to recognize that the interests of parent and child may conflict, so that parents may not exercise an automatic veto over decisions made by the child.

This possible conflict of interest between parent and child has likewise been recognized by courts faced with deciding what due process protections are constitutionally mandated before a child can be committed to a mental institution. As the court in *Bartley v. Kremens*, 402 F.Supp. 1039, 1047-48 (E.D. Pa. 1975), *rev'd on other grounds*, 431 U.S. 119 (1977), *argued sub. nom., Secretary of Public Welfare v. Institutionalized Juveniles*, 47 L.W. 3257 (10/10/78), stated: "In deciding to institutionalize their children, parents, as well as guardians *ad litem* or persons standing in *loco parentis*, may at times be acting against the interests of their children." *In accord, J.L. v. Parham*, 412 F.Supp. 112, 138 (M.D. Ga. 1976), *probable juris. noted* 431 U.S. 936 (1977); *In re Roger S.*, 569 P.2d 1286, 1291 (Cal. 1977).[14]

Similarly, the interests and wishes of parents and their children may conflict when the custody or placement of a child is at issue. Many commentators have recognized this conflict and suggest that children should be represented independently in custody disputes between parents and in adoption proceedings.[15] In a case in which a custody order was vacated for failure to appoint a representative for the child, the Wisconsin Supreme Court noted that "the interest of the child is distinct and separate from that of other parties to the litigation and . . . in some cases even the interests of siblings may be incompatible with each other and require separate representation." *de Montigny v. de Montigny*, 233 N.W.2d 463, 468 (Wis. 1975).

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[14] In reaching these conclusions, these courts are acknowledging the position frequently articulated by commentators. *See, e.g.*: Comment, *'Voluntary' Admission of Children to Mental Hospital: A Conflict of Interest Between Parent and Child*, 36 MD. L. REV. 153 (1976); Panneton, *Children, Commitment and Consent: A Constitutional Crisis*, 10 FAM. L. Q. 295 (1977).

[15] *See, e.g.*, Wilcox, *A Child's Due Process Right to Counsel in Divorce Proceedings*, 27 HAST. L. J. 917 (1976); Genslen, *Separate Legal Representation for Children: Protecting the Rights and Interests of Minors in Judicial Proceedings*, 11 HARV. C.R.-C.L.L. REV. 565 (1976); Bodenheimer, *New Trends and Requirements in Adoption Law and Proposals for Legislative Change*, 49 S. CAL. L. REV. 10 (1975); Inker & Paretta, *A Child's Right to Counsel in Custody Cases*, 5 FAM. L. Q. 108 (1971); and Podell, *The "Why" Behind Appointing Guardians Ad Litem for Children in Divorce Proceedings*, 57 MARQ. L. REV. 103 (1973).

The commentators agree that the provision of independent representation for the child is critical to an adequate resolution of the significant conflicting interests at issue in abuse and neglect proceedings.[16] The appointment of an attorney to represent the child who is the subject of neglect, abuse or termination proceedings is further supported by model acts[17] and current standards proposed for the improvement of the juvenile justice system.[18]

Accepting that there is no adequate representation of the child's interests at an adjudicatory hearing by either the state or the parent, the same can be said at the initial removal hearing. The child has an interest in obtaining protection from "immediate danger[s] to his health or physical safety." TEX. FAM. CODE ANN. § 17.01. This interest is coupled, however, with an interest in obtaining such care in the child's own home or in an atmosphere as similar thereto as possible. *See, e.g.*, Wald, (1975) at 991-1000. Fulfillment of these dual require-

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[16] J. Goldstein, A. Freud, A. Solnit, *Beyond the Best Interest of the Child* (1973); Genslen, *Separate Legal Representation for Children: Protecting the Rights and Interests of Minors in Judicial Proceedings*, 11 HARV. C.R.-C.L. L. REV. 565 (1976); Comment, *Courts: Seen and Not Heard: The Child's Need for His Own Lawyer in Child Abuse and Neglect Cases*, 29 OKLA. L. REV. 439 (1976); Comment, *Dependent-Neglect Proceedings: A Case for Procedural Due Process*, 9 DUQ. L. REV. 651 (1971); Grumet, *The Plaintive Plaintiffs: Victims of Battered Child Syndrome*, 4 FAM. L. Q. 296 (1970).

[17] MODEL ACTS FOR FAMILY COURTS §25 (1975); MODEL ACT TO FREE CHILDREN FOR PERMANENT PLACEMENT §12 (1978).

[18] INST. OF JUDICIAL AD./A.B.A., *Standards Relating to Counsel for Private Parties*, Standard 2.3(b) (1976); INST. OF JUDICIAL AD./A.B.A., *Standards Relating to Abuse and Neglect*, Standards 5.1E (1977); NAT'L. ADVISORY COMMITTEE ON CRIM. JUST. STANDARDS AND GOALS, *Juvenile Justice and Delinquency Prevention*, Standard 16.5 (1976); and *Report of the Advisory Committee to the Administrator on Standards for the Administration of Juvenile Justice*, Standard 3.132 (U.S. DEPT. OF JUSTICE, LAW ENFORCEMENT ASSISTANCE AD. (1976)).

ments will present particular conflicts with the interests asserted by both state and parents for a variety of reasons endemic to the nature of a prompt hearing. Provision of independent representation of the child in these proceedings will provide the safeguards necessary to increase the likelihood of a correct removal decision.

The state's interest in these actions is primarily one of offering protection for the child. As a result, in some instances children may be removed prematurely or unnecessarily[19] despite the fact that serious trauma often follows such actions.[20]

Since these removals are only undertaken in emergencies, there is rarely an opportunity for a thorough investigation of the possibility of protecting the child by in-home supervision or part-time foster care. As a result, children are normally placed in large shelter care facilities bearing little resemblance to a family setting. The participation of an independent representative for the child will allow the investigation of alternatives less drastic than removal of the child from the home.

When supportive services or protective supervision will not provide the necessary care, alternatives to shelter care may be explored by counsel. In many instances other relatives or neighbors may be able to provide care for the child on a temporary basis thereby minimizing the disruption to the child.[21] Where foster placements are not available within an individual county, it may be possible to secure such care in a neighboring county. Finally, the attorney for the child may be able to exert pressure on the local agency to move the child into foster care as soon

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[19] *See* footnote 7.

[20] *See* the discussion at pp. 10-13.

[21] In the instant case two of the Sims children were eventually placed with their maternal grandparents, but not until twelve days had elapsed from the initial seizure. *See* Appendix, Volume II, pp. 153-155.

as a placement becomes available, prior to the adjudicatory hearing.

Reliance on the parents to assert the rights and interests of the child is as equally misplaced as reliance on the state. In some situations the parents may not be present due to their emergency hospitalization for medical or psychiatric care, or simply because the child has been abandoned. Even in situations when the parents are present, there is no guarantee that they will be represented by legal counsel.[22]

Assuming the presence of parents, and their representation by adequate, competent counsel, difficulties still remain in insuring that the child's interests will be represented. Counsel for the parent may use the initial hearing more as an opportunity to learn the type and quality of evidence to be presented by the state at adjudication than to present an affirmative case on the parents' behalf. This could become particularly true in jurisdictions such as Texas where a full adjudicatory hearing will be held within ten days of the initial removal.

Another possibility cited by some of the commentators stems from the fact that parents may misperceive the role of the social worker investigator in these cases. In attempting to cooperate with the investigator, parents might even go so far as to accede in the removal, either because of a fear that welfare payments will be cut off, or because of a belief that the child will be returned more quickly.[23] The participation of the child at this stage through counsel, then, is the only way to insure that the risk of an erroneous decision is minimized in these emergency hearings.

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[22] The issue of the parent's right to counsel was presented to the three-judge court in the companion case to *Sims, Woods v. Jimenez.* The court declined to rule on that issue, however. *Sims,* 438 F.Supp. at 1195.

[23] Levine, at 13.

Additional benefits, including an increased likelihood of a proper determination at adjudication, will also flow from the early provision of counsel to the child. Although it is generally accepted that early entrance of counsel into any litigation increases the likelihood of competent representation, the situation is particularly critical in cases where a child is a potential witness. Young children are thought generally capable of describing discreet events[24] but may often have trouble ordering events chronologically or accurately judging duration.[25] For these reasons it is thought crucial that the attorney appointed to represent the child interview the client as soon as possible after a removal from the home. Besides preserving the events as they have actually occurred, early contact facilitates a more accurate picture of the child's feelings toward the parents. Children are generally thought to be highly suggestible and susceptible to manipulation by adult authority figures.[26] Given that the temporary care of the child may occur in an atmosphere hostile to the child's parents, interviews with the child after exposure to such environments may be colored significantly by these influences.

Further, the prompt appearance of an attorney for the child into the case may assist in the preservation of physical evidence and witnesses' testimony.[27] Photographs of a child's injuries or medical examination to detect the presence of semen may all be critical in an eventual adjudicatory hearing. Prompt medical

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[24] H. Freeman and H. Weihofen, *Clinical Law Training* 458 (1972).

[25] J. Praget, *The Child's Conception of Time* 10-29, 39-49 (1927); D. Flapan, *Children's Understanding of Social Interaction* 3 (1968).

[26] Freeman and Weihofen, at 460; J. Rich, *Interviewing Children and Adolescents* at 41, 56.

[27] INST. OF JUDICIAL AD./A.B.A., *Standards Relating to Counsel for Private Parties,* Commentary at 98 (1976).

or psychiatric examination of the parent or child may also be important.[28] Potential witness testimony may be lost if not taken at once.

Independent counsel for the child is also essential at the emergency hearing stage to insure that counsel for the parents and the state do not waive the ten day time limit for the full adversary hearing. Although the three-judge court held that the state may not "stack" *ex parte* orders and thereby retain custody of the child for more than ten days "without complete adversary hearing with notice to the parents," *Sims*, 438 F.Supp. at 1193, this does not eliminate the possibility that, after notification, the parties might not agree to postpone the full hearing. The existence of such a possibility underscores the necessity of giving the child a voice with which to protect his/her own interests in speedy resolution of the custody dispute.

Commentators have recognized the gravity of the deprivation suffered in even temporary removals, the inherent conflicts occurring in any subsequent judicial scrutiny of these actions, and the potential positive contribution of independent counsel for the child. These concerns have prompted them to recommend that representation of the child commence at the earliest possible date in abuse and neglect proceedings, participating in any judicial review of the need for detention.[29]

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[28] *Id.* at 98.

[29] MODEL ACTS FOR FAMILY COURTS, 27 §23 (1975): "(c) At the commencement of the detention or shelter care hearing, the judge shall advise the parties of the right to counsel and shall appoint counsel as required by Section 25."; INST. OF JUDICIAL AD./A.B.A., *Standards Relating to Abuse and Neglect*, 86, Standard 4.3 (1977):

> Court review regarding children in emergency temporary custody. A. Immediately upon receipt of a petition submitted pursuant to Standard 4.2 [an agency taking emergency temporary custody of a child], the court should direct notification pursuant to Standard 5.1D., appointment of counsel for the child pursuant to Standard 5.1E., and referral of the petition for prosecution pursuant to Standard 5.1F. . . .

NAT'L. ADVISORY COMMITTEE ON CRIM. JUST. STANDARDS AND GOALS, *Juvenile Justice and Delinquency Prevention*, 565 Standard 16.7 (1976):

> [L]egal representation should be made available at the earliest feasible stage of family court proceedings. Each State at least should adopt procedures whereby counsel can be appointed:
>
> 1. At the intake stage where the juvenile is not detained; and
>
> 2. At the judicial detention hearing stage where the child has been removed from the home.

The state's final argument against the appointment of counsel for the child at the emergency hearing stage is the " 'undue burden' such a requirement creates." A.B. at 43. They assert that the "practical implications would be overwhelming . . . particularly when weighed against the short-term impact of the *ex parte* emergency hearing." A.B. at 43. Given that counsel must in any case be appointed for the full adversary hearing, it is difficult to understand how a slightly earlier appointment would create additional burdens. Furthermore, that the impact of the *ex parte* hearing may be much more than "short-term" was precisely the reason that the three-judge court extended this requirement to this important stage of the proceedings.

III

A Finding Based on the Standard of Clear and Convincing Evidence Should Be Required in All Proceedings Affecting the Parent-Child Relationship.

The three-judge court held that the standard of proof in suits affecting the parent-child relationship should be "clear and convincing evidence." It reasoned:

> Section 11.15 provides for a preponderance of the evidence standard in any suit affecting the parent-child relationship. While such a suit is not akin to a delinquency proceeding

> requiring proof beyond a reasonable doubt, *In re Winship*, 397 U.S. 358, 90 S.Ct. 358, 25 L.Ed.2d 368 (1970), the fundamental right to family integrity requires at the very least that the State notify the parents of the allegations and prove its case by clear and convincing evidence. *Alsager v. District Court of Polk County Iowa, supra.*

Sims, 438 F.Supp. at 1194.[30]

This decision comports well with the reasoning of this Court. As Mr. Justice Harlan explained, concurring in *In re Winship*, 397 U.S. 358, 370-71 (1970) (emphasis in original):

> First, in a judicial proceeding in which there is a dispute about the facts of some earlier event, the factfinder cannot acquire unassailably accurate knowledge of what happened. Instead, all the factfinder can acquire is a belief of what *probably* happened. The intensity of this belief—the degree to which a fact finder is convinced that a given act actually occurred—can, of course, vary. In this regard, a standard of proof represents an attempt to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication. Although the phrases 'preponderance of the evidence' and 'proof beyond a reasonable doubt' are quantitatively imprecise, they do communicate to the finder of fact different notions concerning the degree of confidence he is expected to have in the correctness of his factual conclusions.
>
> A second proposition, which is really nothing more than a corollary of the first, is that the trier of fact will sometimes, despite his best efforts, be wrong in his factual conclusions. In a lawsuit between two parties, a factual error can make a difference in one of two ways.
>
> First, it can result in a judgment in favor of the plaintiff when the true facts warrant a judgment for the defendant. . . . On the other hand, an erroneous factual determination can result in a judgment for the defendant when the true facts justify a judgment in plaintiff's favor. . . .
>
> The standard of proof influences the relative frequency of these two types of erroneous outcomes. . . . Because the standard of proof affects the comparative frequency of these two types of erroneous outcomes, the choice of the standard to be applied in a particular kind of litigation should, in a rational world, reflect an assessment of the comparative social disutility of each.

Although the holding in *Winship* concerned delinquency cases, Justice Harlan's analysis and reasoning is nevertheless applicable to determining the appropriate standard of proof in the dependency cases under consideration here.

The inquiry is, therefore, what standard of proof in suits affecting the parent-child relationship will create the least "social disutility."

It has been established that children and parents have a liberty interest in remaining together without state interference. *See* pp. 6-9, *supra*. "Since the essential reason for the requirement of a prior hearing is to prevent unfair and mistaken deprivations of property, however, it is axiomatic that the hearing must provide a real test." *Fuentes v. Shevin*, 407 U.S. 67, 97 (1972). When we are concerned with family integrity, rights deemed by this Court "far more precious . . . than property rights," *May v. Anderson*, 345 U.S. 528, 533 (1953), the need for a "real test," *(Fuentes)* becomes even more acute. For:

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[30] *See also Singleman, A Case of Neglect: Parens Patriae Versus Due Process in Child Neglect Proceedings*, 17 ARIZ. L. REV. 1055, 1087 (1975), "most model acts adopt the middle ground standard of clear and convincing proof," *citing*, NATIONAL COUNCIL ON CRIME AND DELINQUENCY, MODEL RULES FOR JUVENILE COURTS, rule 26 (1969); UNIFORM JUVENILE COURT ACT Sec. 29(c).

> This Court has not . . . embraced the general proposition that a wrong may be done if it can be undone. *Cf. Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969). Surely, in the case before us, if there is delay between the doing and the undoing petitioner suffers from the deprivation of his children, and the children suffer from uncertainty and dislocation.

Stanley v. Illinois, 405 U.S. at 647.

Furthermore, a higher standard of proof is required in a suit affecting the parent-child relationship precisely because once parents are deprived of their children, that deprivation may not easily be undone. Once a state sustains its burden in the initial suit affecting the parent-child relationship, many states shift the burden to the parents at the dependency renewal hearing to show cause why the jurisdiction of the court over the minor should be terminated:

> [T]he burden of proof . . . [was] not satisfied by a mere showing that the minor has a parent capable of exercising effective parental care and control over him. While [this] . . . was necessary at the original hearing . . . continued jurisdiction over the minor is not dependent solely on whether a parent is capable of exercising proper and effective parental control over him but on whether the best interest of the child is served by freeing him from further supervision. . . .

In re Francecisco, 94 Cal. Rptr. 186, 180 (1971). Thus, because the probability of return of the child to his/her parents after the initial determination at the suit affecting the parent-child relationship is diminished, a factfinder should be required to have a higher degree of confidence in his or her factual conclusions than a mere "preponderance of the evidence."

Returning to Justice Harlan's analysis in *In re Winship*, 397 U.S. at 371-372:

> In a civil suit between two private parties for money damages, for example, we view it as no more serious in general for there to be an erroneous verdict in the plaintiff's favor. A preponderance of the evidence standard therefore seems peculiarly appropriate for, as explained most sensibly, it simply requires the trier of fact 'to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact's existence.' In a criminal case, on the other hand, we do not view the social disutility of convicting an innocent man as equivalent to the disutility of acquitting someone who is guilty. As Mr. Justice Brennan wrote for the Court in *Speiser v. Randall*, 357 U.S. 513, 525-526, 78 S.Ct. 1332, 1341-1342, 2 L.Ed.2d 1460 (1958):
>
> > There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden . . . of persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt.

Unlike the civil suit for damages, the instant case concerns interests of "transcending" value since the final outcome of a suit affecting the parent-child relationship may be termination of that relationship. TEX. FAM. CODE ANN. § 11.01(5). Similarly, the loss of liberty upon civil commitment to a mental institution has been found to be an interest of transcending value such as to require proof beyond a reasonable doubt. *See, e.g., In re Ballay*, 482 F.2d 648 (D.C.Cir. 1973); *accord, Suzuki v. Quisenberry*, 411 F.Supp. 1113, 1132 (D. Hawaii 1976); *Lessard v. Schmidt*, 349 F.Supp. 1078, 1095 (E.D.

Wis. 1972). A judicial decision to remove a child from his or her parents following a suit affecting the parent-child relationship may result in a loss of liberty similar to that of one who is civilly committed because the child may be placed in an institution if placement with relatives or in foster homes is not available. For these reasons, something more than a preponderance of the evidence should be required.[31]

The preponderance test, at best, only requires the decision-maker to determine "what he believes most probably happened." *In re Winship*, 397 U.S. at 371, n.3. To allow families to be disrupted or destroyed on the basis of what "probably happened" does not comport with either the primacy this Court has determined family life to be deserving of or with the potentially severe emotional impact removal from the home may have on the very child whose "best interests" are at issue.

Appellant's justifications for a preponderance standard are unpersuasive. They urge that since the area of child neglect is "not readily quantifiable" a preponderance standard is adequate. A.B. at 44. However, the subjectivity of the determination argues for a higher standard of proof. By definition, to relax the standard to a mere showing of "preponderance" is to maximize, and not, as is required, "to minimize substantively unfair or mistaken deprivations. . . ." *Fuentes*, 407 U.S. at 81.

The State's further justifications are unenlightening. The higher standard of proof required by due process does not impose any cost whatsoever on the State. It is no more time-

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[31] A clear and convincing standard "is no stranger to the civil law", *Woodby v. Immigration Service*, 385 U.S. 276, 285 (1966); and has been applied ". . . in situations where the various interests of society are pitted against restrictions on the liberty of the individual . . ." *In re Ballay*, 482 F.2d at 662. *Woodby v. Immigration Service*, deportation; *Chaunt v. United States*, 364 U.S. 350 (1960), denaturalization.

consuming or difficult to apply one standard than the other.[32] As noted previously, error and mistaken seizures pervade this area.

Amici desire to protect the innocent abused child, as well as the innocent non-abusing family. To require clear and convincing proof before children are taken away strikes a fair balance between these concerns.

IV

The Younger v. Harris Doctrine of Equitable Restraint Should Not Be Applied in This Case.

The establishment of federal question jurisdiction, the decision in *Ex Parte Young*, 209 U.S. 123 (1908), permitting federal courts to grant injunctive relief against the threatened enforcement of unconstitutional state laws, and the enactment of the Civil Rights Act of 1871 and its jurisdictional counterparts, "established the modern framework for federal protection of constitutional rights from state interference." *Perez v. Ledesma*, 401 U.S. 82, 107 (1971). Indeed, federal courts have become the "*primary* and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States." *Steffel v. Thompson*, 415 U.S. 452, 464 (1974) (emphasis in original).

The federal courts are not, however, unrestricted in exercising jurisdiction in certain types of cases. In *Younger v. Harris*,

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[32] Civil Courts are familiar with this standard. As this Court has noted:

> This standard, or an even higher one, has traditionally been imposed in cases involving allegations of civil fraud, and in a variety of other kinds of civil cases involving such issues as adultery, illegitimacy of a child born in wedlock, lost wills, oral contracts to make bequests, and the like. See 9 Wigmore, Evidence Sec. 2498 (3d ed. 1940).

Woodby v. Immigration Service, 385 U.S. at 285, n. 18.

401 U.S. 37 (1971), this Court held that in the absence of extraordinary circumstances, a federal court is precluded from enjoining a pending state criminal prosecution. The purpose of the rule was spelled out by the Court:

> To prevent erosion of the role of the jury and [to] avoid a duplication of legal proceedings and legal sanctions where a single suit would be adequate to protect the rights asserted.
>
> [T]he notion of "comity" . . ., the belief that the National Government will fare best if the States and their constitutions are left free to perform their separate functions in their separate ways.

401 U.S. at 44.

The policy of equitable restraint expressed in *Younger v. Harris*, 401 U.S. 37 (1971), is premised on the notion that an accused party is generally afforded an opportunity to vindicate his constitutional claims in the pending state court proceedings. Ordinarily a pending state prosecution provides the accused with a fair and sufficient opportunity to vindicate all constitutional rights. *See Kugler v. Helfant*, 421 U.S. 117, 124 (1975); *Steffel v. Thompson*, 415 U.S. 452, 460 (1974); *Lamb Enterprises, Inc. v. Kiroff*, 549 F.2d 1052, 1062 (6th Cir. 1977). Thus, the Court continued in *Younger*, 401 U.S. at 43: "Courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief."

If state remedies are inadequate and irreparable injury is threatened, federal courts may still act. In *Gerstein v. Pugh*, 420 U.S. 103 (1975), this Court held that *Younger* abstention was not warranted in a case which sought injunctive relief against pre-trial detention without a judicial determination of probable cause. This Court determined that the issue of the

legality of the pre-trial detention could not be raised as a defense to the criminal prosecution and that since the injunctive relief granted (an order to hold preliminary hearings) could not prejudice the trial on the merits, injunctive relief was appropriate. 420 U.S. at 108, n.9. The *Gerstein* holding has most recently been re-affirmed in *Judice v. Vail*, 430 U.S. 327 (1977).

Amici submit that *Gerstein* is dispositive of the case *sub judice*. The constitutional challenge in *Gerstein* in no way threatened the state's ability to prosecute the defendants; no constitutional challenge to their prosecution was made. Only the constitutionality of holding defendants without a judicial hearing was raised. Here appellees are in an identical situation; they do not challenge the state's right to pursue its "suit affecting the parent-child relationship." Rather, as in *Gerstein*, the only constitutional challenges of concern are those which urge that seized children may not be held without a prompt post-removal hearing and that counsel be appointed to represent the children at that hearing. As in *Gerstein* the state was merely enjoined from holding children in the absence of this preliminary hearing. Indeed, the hearing prayed for in *Gerstein* to determine the legality of pre-trial detention is directly analogous to the hearing appellees seek herein to determine the legality of the seized children's detention pending an adversary hearing. Here, appellees' suit is in no way "designed to annul the results of a state trial," since the relief sought can be said to be "wholly prospective": to preclude further summary seizures of appellees' children pursuant to a state law and practice alleged to violate appellees' constitutional rights. *Wooley v. Maynard*, 430 U.S. 705, 711 (1977).

Further, there is no opportunity during the course of the hearing on the merits either in a criminal case *(Gerstein)* or in a suit affecting the parent-child relationship to raise the issue of the legality of the pre-adjudicatory activities as a defense to the charge. The defense to the charge that a person in fact has com-

mitted a crime or has abused or neglected a child is in no way affected by activities such as the denial of a probable cause determination or the summary seizure and detention of a child. These issues will not be raised in the on-going state proceeding and the parties will not be afforded an opportunity to vindicate their rights in the state proceedings.[33]

These same principles have been followed in a case involving the juvenile court system.[34] In *Conover v. Montemuro*, 477 F.2d 1073 (3d Cir. 1973), cited with approval in *Gerstein*, 420 U.S. at 108, n.9, a class consisting of juveniles who had been or were likely to be subjected to the intake procedures under the Pennsylvania Juvenile Code, argued that the intake procedures were so vague and standardless as to deprive them of due process. The Third Circuit reversed the lower court's opinion and held that the principles of *Younger* did not require abstention since the juveniles who had been processed through the system had no opportunity to raise their claims prior to adjudication and no Pennsylvania procedure exists which would permit them to vindicate their claims. 477 F.2d at 1081. Moreover, the challenge to the intake procedure did not involve issues raised at an adjudicatory hearing, nor did the challenge in any way interfere with subsequent prosecution of these juveniles by the State. The court stated: "Since a remedy with respect to the

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[33] In *Trainor v. Hernandez*, 431 U.S. 434 (1977), the Court remanded for a determination as to "whether appellees could have presented their federal due process challenge . . . in the pending state proceeding." 431 U.S. at 447. The impossibility of raising the due process issues herein in the pending state proceeding shall be elaborated upon *infra*.

[34] *See also, Cox v. Turley*, 506 F.2d 1347 (6th Cir. 1974); *Santiago v. Philadelphia*, 435 F. Supp. 1136 (E.D. Pa. 1977); *McRedmond v. Wilson*, 533 F.2d 757 (2d Cir. 1976), holding that federal court challenges to the pre-adjudicatory stage in juvenile cases were not subject to the *Younger* abstention rule. *Cf. Ealy v. Littlejohn*, 569 F.2d 219 (5th Cir. 1978), in which the court held that because there was no formal ongoing criminal proceeding nor any available state civil proceeding in which plaintiffs could vindicate their constitutional rights, *Younger* equitable restraint is inappropriate.

intake procedures would not necessarily interfere with the adjudication function of the Commonwealth's juvenile court, it is therefore not necessarily precluded by *Younger v. Harris, supra*, or *Samuels v. Mackell, supra*." 477 F.2d at 1082.

Appellees in this case find themselves in a situation similar to that of the plaintiffs in *Conover v. Montemuro*. They challenge the pre-hearing procedures in abuse and neglect cases; a decision concerning the constitutionality of procedures at the pre-adjudicatory stage will not preclude the state from proceeding with the charges. In fact, a petition has been pending since May 1976 in the Montgomery County juvenile court, yet the State has not proceeded on this charge even though it may do so.

The judgment of the district court imposes no impediment to proceeding to a hearing on the merits of the claim; the State could seek temporary custody pending the hearing subject only to the requirement that notice and a prompt post-removal hearing be provided. Indeed, the State can still summarily seize the Sims' children if there is an immediate danger to their health or physical safety. The district court's judgment only requires that the State be prepared to defend the necessity for the summary seizure and any request for temporary custody at a hearing to be held at the earliest reasonable time.

Similarly, the Sixth Circuit found the rule in *Younger* inapplicable in a case in which injunctive relief was sought from a federal court to permit out-of-state attorneys to represent a client in a state criminal proceeding. *Flynt v. Leis*, 574 F.2d 874 (6th Cir. 1978), *cert. granted*, — U.S. —, 46 U.S.L.W. 3723 (May 12, 1978). In that case, the court held there was no method by which the state proceedings then pending could provide a forum for the adjudication of the attorneys' rights:

> While the relief sought by the Plaintiffs necessarily entails a delay in the state court criminal prosecution, the grant of relief will not permanently prevent prosecution. Follow-

> ing the hearing, the State prosecution may go forward on the merits. The grant of relief will not prevent the State from interpreting and enforcing its own criminal laws.

574 F.2d at 881. *Accord, Bundy v. Rudd,* 581 F.2d 1126, 1130 (5th Cir. 1978).[35]

As we have shown, abstention is improper when the issue cannot be raised in the on-going state procedure or the inadequacy of the state court remedy renders imperative the availability of a federal forum. *See also, Huffman v. Pursue, Ltd.,* 420 U.S. 592 (1975). Both *Huffman* and *Juidice v. Vail,* involved situations in which in addition to the opportunity to present their claims in the state trial court, there was a clearly defined remedy of state statutory appeal through which plaintiffs might have vindicated their federal constitutional claims. In *Huffman,* plaintiff on advice of counsel *deliberately sought to forego* raising his federal claim as a defense in the state court proceeding, choosing instead to file in the district court, therein seeking relief which would annul the result of the prior state proceeding. *Huffman,* 420 U.S. at 609-610. In *Juidice* the plaintiff again clearly had state statutory appeal available as a remedy. The plaintiff in *Juidice,* however, for a period of more than nine months ignored every stage of the state court proceeding in which he had been a defendant and instead decided to become a plaintiff in an action brought in the district court. *Juidice,* 430 U.S. at 330.

Similarly, in *Trainor v. Hernandez,* plaintiffs failed to file an answer, did not attempt to obtain a hearing or to quash the attachment. Rather, they immediately filed suit in federal district court. After reviewing these factors, this Court held

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[35] *See Doe v. Maher,* 414 F.Supp. 1368 (D.C. Conn. 1976), *vacated on other grounds,* 432 U.S. 526 (1977), in which the court found that the inability of plaintiff to raise her constitutional claims in defense of the state proceeding warranted the entry of injunctive relief against the state court proceeding.

that the district court had not addressed the issue of whether an adequate state forum exists in which the federal constitutional claim could have been raised. 434 U.S. at 447.

A very different situation exists in the instant case. After reviewing the procedural steps taken by Mr. and Mrs. Sims, the district court stated: "Unlike the plaintiff in *Juidice,* the *Sims* plaintiffs have not failed to avail themselves of *any* opportunities in the state procedures." 438 F.Supp. at 1188 (emphasis added). Thus, the court held: "We find the confusion, the procedural irregularities, and the absence of a fair opportunity to present constitutional claims at a meaningful time to be such as to justify federal equitable relief even if *Younger* principles did apply." 438 F.Supp. at 1188.

Yet appellants allege that appellees could have pursued their claims in a state forum; this is clearly erroneous. J.S. at 18. On March 26, 1976, one day after the children were seized, the Texas Child Welfare Unit instituted a suit for the protection of the child in an emergency, TEX FAM. CODE ANN. Chap. 17, in Harris County, Texas. On that very day (March 26), the judge issued an *ex parte* order pursuant to TEX. FAM. CODE ANN. § 17.04, sanctioning the emergency removal. On March 31, 1976, the parents presented a Motion to Modify the *ex parte* order as authorized by TEX. FAM. CODE ANN. § 17.06. This Motion was not accepted due to the absence of one judge and the reluctance of another to rule on the motion. Therefore, the motion was never set for hearing or ruled on by the court.[36]

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[36] Although appellees are clearly not required, under *Younger* principles, to exhaust extraordinary state remedies prior to seeking federal relief, they nonetheless petitioned for a Writ of Habeas Corpus in the Juvenile Court of Harris County on March 31, 1976. *See, Steffel v. Thompson,* 415 U.S. 452, 472-3 (1974); *Monroe v. Pape,* 365 U.S. 167, 183 (1961). The court should have ruled on the petition by April 5, 1976, but for an unknown reason, the court declined to act. The failure of that court to rule on the petition could conceivably be attacked only by way of mandamus. Again, this would

When the Juvenile Court of Harris County refused to set appellees' Motion to Modify the Chapter 17 *ex parte* order issued by the court on March 26, 1976, the court denied appellees their sole opportunity to question the constitutionality of that Chapter. No interlocutory appeal could have been taken from the *ex parte* order entered under Chapter 17. Moreover, even if it were authorized, an appeal could not have been effectuated within the time available to appellees. Under Texas law it is well established that a temporary restraining order is interlocutory in nature and not an appealable order. *Heidelberg v. Harvey,* 368 S.W.2d 947 (Tex. 1963); *Texas State Federation* of *Labor v. Brown & Root,* 223 S.W.2d 622 (Tex. Civ. App. 1950).

An emergency order issued under Chapter 17 is clearly in the nature of a temporary restraining order. It is issued *ex parte* to maintain the status quo once a child has been seized by the Texas Department of Human Resources and will expire at the end of ten days or earlier upon the filing of a "suit affecting the parent-child relationship." TEX. FAM. CODE ANN. § 17.05.

On April 5, 1976, the parties appeared before Judge Lowry of the Harris County Juvenile Court. This was the first time since their seizure that the children were brought before the court for any hearing and the first time the parents were given any opportunity to appear. Although a Petition for Writ of Habeas Corpus was pending and the Motion to Modify could have been set, Judge Lowry did not address the merits of the case, but rather merely transferred the case to Montgomery County, the county of the family's residence. Thus the substantive issues of

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require the filing of an independent lawsuit invoking the original jurisdiction of the Texas Supreme Court. TEX. CONST. art. V, 3; TEX. REV. CIV. STAT. ANN. art. 1733 (1962). A separate mandamus action, however, would be available only for a limited purpose: to require the juvenile court to *rule* on the Petition for Habeas Corpus.

the parents' claim were not addressed and the children were continued in the custody of the court.

Not content with this action, the Child Welfare Unit filed a second suit pursuant to TEX. FAM. CODE ANN. § 11.11 in Harris County Juvenile Court on April 5, 1976. On that very day, the same day on which the prior suit had been transferred by this same judge, Judge Lowry issued another *ex parte* order. This order continued custody of the children with the Child Welfare Unit. Once again notice of the hearing was not given to the parents. Subsequently, on April 6, 1976, all matters were officially transferred to Montgomery County. At this point, there were two *ex parte* orders issued pursuant to TEX. FAM. CODE ANN. Chap. 17 and Chap. 11, which ostensibly were in effect. No appeal could be taken from these orders, however.

The Houston Court of Civil Appeals, the court to which an appeal of a juvenile court order must be taken from Montgomery and Harris Counties, has consistently ruled that no interlocutory appeal is permitted under the Texas Family Code. The most recent reported decision of that court concerning this issue is *Knipe v. Colpitts,* 551 S.W.2d 150 (Tex. Civ. App. 1977), in which a parent sought to appeal from an order establishing temporary child visitation. The court noted that this was an order only affecting the rights of the parties pending trial on the merits, and held that "orders of a nature affecting visitation and conservatorship are interlocutory only and not appealable." 551 S.W.2d at 151. *See also, Johnson v. Parish,* 547 S.W.2d 311 (Tex. Civ. App. 1977), holding that there is no right of appeal from an order entered under TEX. FAM. CODE ANN. § 11.11; *Carpenter v. Ross,* 534 S.W.2d 447 (Tex. Civ. App. 1976). As stated above, an order entered under Chapter 17 is also interlocutory and cannot be appealed.

There was simply no remedy available by which appellees could have raised their constitutional claims in the pending

state proceeding.[37] The issues arising out of the Chapter 11 and Chapter 17 *ex parte* orders, the issue of appointment of counsel, and the Chapter 34 CANRIS questions could only have been raised by the initiation of separate lawsuits in the state courts. Moreover, had even that extraordinary course of action been adopted, there is no certainty that appellees could have obtained a hearing on the merits of their claims.

Appellees were denied the opportunity to raise their constitutional questions as to Chapter 17 by the refusal of the juvenile court of Harris County to hear their Motion to Modify the Emergency Orders, and thus could not preserve this question for appeal. Similarly, appellees could not have raised the constitutionality of the stacking of the *ex parte* emergency order issued under Chapter 17 on March 26, 1976, and the *ex parte* temporary restraining order issued under Chapter 11 on April 5, 1976, since these interlocutory orders would have expired upon the rendition of a final judgment and would have been considered moot issues by the Texas courts.

Texas courts decline to rule on the constitutionality of statutes whenever such a ruling can be avoided and in those cases in which the constitutional issue does not reach the merits of the case. *San Antonio General Drivers, Helpers Local No. 657 v. Thornton*, 299 S.W.2d 911 (Tex. 1957); *Texas Department of Public Safety v. Perlman*, 340 S.W.2d 522 (Tex. Civ. App. 1960). Thus, the constitutionality of a temporary order will not be reviewed by an appellate court following the entry of a final judgment, since under Texas law that issue is moot because the order has expired. *Coleman v. Texas State Department of Public Welfare*, 562 S.W.2d 554 (Tex. Civ. App. 1978); *In the Matter of R.E.W.*, 545 S.W.2d 573 (Tex. Civ. App.

[37] On May 4, 1976, the parents filed a motion for leave to file an original Petition for Writ of Habeas Corpus in the Texas Court of Civil Appeals. The motion was denied on the same date for want of jurisdiction, thereby foreclosing the possibility of seeking any appellate redress at this stage.

1976); *Conway v. Irick*, 429 S.W.2d 648 (Tex. Civ. App. 1968).

In *Coleman*, a mother whose child was taken from her at a hearing in which she was not represented by counsel, whose child was kept from her custody for a period of fifteen months by temporary orders, who had asserted federal due process violations by motion in the trial court, and whose parental rights had been terminated after a trial on the merits sought to raise the due process violations on appeal. The Texas Court of Appeals refused to consider these issues holding: "Any error which may have been committed in issuing the temporary order is perforce of the final judgment immaterial, and renders that issue in the appellate court moot." 562 S.W.2d at 556.

Unlike this case, in *Juidice v. Vail* it was "abundantly clear that appellees had an *opportunity* to present their federal claims in the state proceedings," either at the hearing on the order to show cause or on a post hearing motion to stay or vacate the contempt fine and commitment. 430 U.S. at 337. In *Trainor v. Hernandez*, appellees neither answered the attachment pleadings nor sought to quash or be heard on the constitutional questions surrounding the attachment's issuance. Whether the state remedies available to the *Trainor* appellees were in fact viable was left unresolved by this Court. 434 U.S. at 447, n. 10. It was clear, however, that, as in *Juidice*, the *Trainor* appellees completely failed to pursue their constitutional claims in the pending state proceeding. Hence, they were correctly barred by *Younger* principles which preclude the State's being confronted with a "choice of engaging in duplicative litigation. . . ." *Trainor v. Hernandez*, 434 U.S. at 445.

Appellees in the instant case concede that they "need be accorded only an *opportunity* to fairly pursue their constitutional claims in the *ongoing state proceedings*. . . ." *Gibson v. Berryhill*, 411 U.S. 564, 577 (1973) (emphasis added). The fore-

going amply demonstrates that appellees have been accorded no such opportunity. Indeed, their persistent and extraordinary attempts to avail themselves of all avenues of redress were consistently thwarted by the appellants. Therefore, the federal district court was correct in refusing to apply the doctrine of equitable restraint enunciated in *Younger v. Harris*, to this case.

CONCLUSION

For the above-stated reasons, the decision below should be affirmed.

Respectfully submitted,

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